

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DEONDRE KENYETTA ELIE,

Defendant-Appellant.

UNPUBLISHED

March 4, 2010

No. 289068

Wayne Circuit Court

LC No. 06-007727-FH

Before: Gleicher, P.J., and Fitzgerald and Wilder, JJ.

PER CURIAM.

A jury convicted defendant of carrying a concealed weapon (CCW), MCL 750.227, third-degree fleeing or eluding a police officer, MCL 257.602a(3), and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court eventually sentenced defendant to concurrent prison terms of two to five years for the CCW conviction and two years for the felony-firearm conviction, and a consecutive term of two to five years' imprisonment for the fleeing or eluding conviction, to commence after the felony-firearm sentence. This Court affirmed defendant's convictions and his felony-firearm sentence, but vacated his CCW and fleeing or eluding sentences and remanded for resentencing on those offenses. *People v Elie*, unpublished opinion per curiam of the Court of Appeals, issued January 15, 2008 (Docket No. 275081). The trial court resentenced defendant to two to five years each for the CCW and fleeing or eluding convictions. Defendant appeals as of right, and we again vacate the CCW and fleeing or eluding sentences and remand for resentencing. We have decided this appeal without oral argument pursuant to MCR 7.214(E).

We previously held that the trial court abused its discretion by exceeding the sentencing guidelines without stating "why the nature of the offenses warranted imposition of a sentence that exceeded the guidelines by nearly three times." *Elie*, slip op at 4. We rejected the trial court's findings that "the level of dangerousness embodied in defendant's acts" and his "palpably preposterous" defense constituted substantial and compelling grounds for a sentence departure. *Id.* at 3-4. We explained as follows the basis for our remand order:

Neither the trial court's reasoning for exceeding the guidelines by nearly three times, nor the extent to which the trial court relied on its conclusion that defendant's defense was frivolous to depart from the guidelines, can be ascertained simply by examining the transcript of the sentencing hearing.

Therefore, a remand for resentencing on the convictions of fleeing and eluding and carrying a concealed weapon is necessary. [*Id.* at 4.]

On resentencing, the trial court imposed the same sentences, citing defendant's prison misconduct as a substantial and compelling basis for departure. Evidence presented at the resentencing hearing demonstrated that during the approximately 865 days defendant had served toward fulfillment of his sentences, prison personnel had issued defendant more than 40 misconduct tickets. Defendant's record of prison misconduct included disobeying direct orders, repeatedly flooding his cell by plugging his toilet or faucet, exposing his penis to female security officers on multiple occasions, engaging in threatening behavior, possessing a shank and a prescription pill, and fighting. The trial court found that defendant's prison misconduct supplied a substantial and compelling reason to depart from the sentencing guidelines range because it demonstrated that he "is simply not fit for community supervision" due to his "propensity for violence and misconduct and sexual delinquency," and that he "does not understand how to live in a structured civilized environment."

Under the sentencing guidelines, defendant's minimum sentence range for the fleeing or eluding conviction fell between zero and nine months. In light of defendant's prison misconduct, the trial court imposed an upward departure of two to five years in prison for both the CCW and fleeing or eluding convictions. Defendant contends that the trial court erred by finding that substantial and compelling reasons warranted a departure from the sentencing guidelines range, and that the extent of the departure imposed, which defendant characterizes as exceeding the upper end of the guidelines range by 400 percent,¹ resulted in a disproportionate sentence.

We review for clear error the reasons the trial court gives for a sentence departure. *People v Smith*, 482 Mich 292, 300; 754 NW2d 284 (2008). We consider de novo as a matter of law a trial court's determination that a reason for departure qualifies as objective and verifiable. *Id.* "Whether the reasons given are substantial and compelling enough to justify the departure is reviewed for an abuse of discretion, as is the amount of the departure." *Id.*

The legislative sentencing guidelines contemplate that the trial court must ordinarily impose a minimum sentence within the calculated guidelines range. MCL 769.34(2), (3); *People v Babcock*, 469 Mich 247, 272; 666 NW2d 231 (2003). Where, as here, the upper limit of the calculated minimum guidelines range is 18 months or less,

the court shall impose an intermediate sanction unless the court states on the record a substantial and compelling reason to sentence the individual to the jurisdiction of the department of corrections. An intermediate sanction may

¹ Defendant erroneously asserts his guidelines range was zero to six months, and thus the 24-month sentences represent a "400%" departure from the upper limit of the guidelines range. Although the sentencing information report originally placed defendant in the A-II cell of the applicable sentencing grid, a correction made at the original sentencing hearing replaced defendant in the C-I cell, which defendant did not challenge, and for which the applicable guidelines range is zero to nine months. MCL 777.66. The sentence actually represents a departure of approximately 165% above the guidelines range.

include a jail term that does not exceed the upper limit of the recommended minimum sentence range or 12 months, whichever is less. [MCL 769.34(4)(a).]

Pursuant to MCL 769.31(b), “intermediate sanction” signifies “probation or any sanction, *other than imprisonment* in a state prison or state reformatory, that may lawfully be imposed.” (Emphasis added). Possible intermediate sanctions include community service, probation, a jail sentence, a fine, or house arrest.

The Legislature has limited a trial court’s authority to deviate from the sentencing guidelines in MCL 769.34(3), which provides in pertinent part as follows:

A court may depart from the appropriate sentence range established under the sentencing guidelines set forth in chapter XVII if the court has a substantial and compelling reason for that departure and states on the record the reasons for departure. All of the following apply to a departure:

* * *

(b) The court shall not base a departure on an offense characteristic or offender characteristic already taken into account in determining the appropriate sentence range unless the court finds from the facts contained in the court record, including the presentence investigation report, that the characteristic has been given inadequate or disproportionate weight. [Emphasis added.]

The substantial and compelling reason justifying departure “must be objective and verifiable, meaning that it is external to the minds of the trial court, the defendant, and others involved in making the decision, and is capable of being confirmed.” *People v Kahley*, 277 Mich App 182, 186; 744 NW2d 194 (2007). To qualify as substantial and compelling, the reason also must “keenly” or “irresistibly” grab a court’s attention and be “of considerable worth” in deciding the length of a sentence. *Babcock*, 469 Mich at 257 (internal quotation omitted). Substantial and compelling reasons for departing from the statutory guidelines exist only in exceptional cases. *Id.*

This Court has held that a trial court may properly consider a defendant’s substantial accumulation of prison misconduct tickets as a basis for departing from the guidelines range. *People v Watkins*, 209 Mich App 1, 5; 530 NW2d 111 (1995). Here, defendant’s lengthy record of prison misconduct qualifies as objective and verifiable, and it keenly grabs our attention “as being of considerable worth in deciding the length of [defendant’s] sentence.” *Babcock*, 469 Mich 257 (internal quotation omitted). Therefore, the trial court correctly observed that a substantial and compelling basis warranted a departure from the guidelines range.

However, we again must find that the trial court failed to justify the particular sentence departure it imposed. In *Smith*, 482 Mich at 304, our Supreme Court emphasized that a trial court must articulate both the reasons for a departure and its justification for the particular departure made:

[I]f it is unclear why the trial court made a particular departure, an appellate court cannot substitute its own judgment about why the departure was justified. A sentence cannot be upheld when the connection between the reasons given for departure and the extent of the departure is unclear. When departing, the trial court must explain why the sentence imposed is more proportionate than a sentence within the guidelines recommendation would have been.

The trial court's articulation must include "an explanation of why the sentence imposed is more proportionate to the offense and the offender than a different sentence would have been." *Id.* at 311.

The trial court offered the following explanation with respect to the proportionality of the sentence departure it selected:

So these misconduct tickets represent in many cases acts of defiance Acts of violence or threatened violence, sexual delinquency. And they are objective and verifiable and compelling and they support in my view a departure from the original sentencing guidelines in this case. But in departing I am also taking the issue of proportionality into effect as I must because we have been instructed by People versus Milbourn, M-I-L-B-O-U-R-N, and it's [sic] progeny, that we are to determine whether the ticket or departure is proportionate to the circumstances of the offense and the offender. And I emphasize the words and the offender.

The offense itself has not changed obviously. The sentencing offense is the same as it was when I sentenced him originally, but it's the offender that has provided us with more well-documented evidence suggesting that he is simply not fit for community supervision because of his propensity for violence and misconduct and sexual delinquency.

So in resentencing Mr. Elie I'm once again going to depart from the original sentencing guidelines in this case. I'm going to issue the same sentence that I did originally. I think that's proportionate to the offender in this case.

Although the trial court articulated its awareness of the proportionality principle, it neglected to articulate an explanation for the extent of the departure independent of the reason it decided on a departure, and did not specifically describe any connection between the reasons supporting the departure and the extent of the sentence departure it imposed. Just as this Court may not substitute its own reasons warranting a sentence departure, *Babcock*, 469 Mich at 258-261, *Smith* instructs that appellate courts must refrain from justifying the extent of a particular departure when the sentencing court has failed to do so. *Smith*, 482 Mich at 318. Given the trial court's lack of explanation why it selected the particular sentence it imposed, which substantially exceeded the intermediate sanction dictated by the guidelines, we simply cannot determine whether the trial court abused its discretion. *Id.* at 311. Consequently, we must again vacate defendant's CCW and fleeing or eluding sentences and remand to the trial court so that it may articulate why the departure it selected is warranted, consistent with *Smith, id.* at 317-319.

Vacated and remanded for resentencing. We do not retain jurisdiction.

/s/ Elizabeth L. Gleicher

/s/ E. Thomas Fitzgerald

/s/ Kurtis T. Wilder